IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DOE, Plaintiff, v. MICHIGAN STATE UNIVERSITY, MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES; JOHN ENGLER, individually and as agent for Michigan State University, KROLL ASSOCIATES, INC., as agent for Michigan State University, MARK EHLERS, individually and as agent for Michigan State University, KENDRA WALDSMITH, individually and as agent for Michigan State University, ANDE DUROJAIYE, individually and as agent for Michigan State University, RICK SHAFER, individually and as agent for Michigan State University, and DENISE MAYBANK, individually and as agent for Michigan State University, Defendants.	:	Civil Action No. 1:18-cv-1413 Hon. Janet T. Neff

DEFENDANTS MICHIGAN STATE UNIVERSITY, MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES, JOHN ENGLER, ANDE DOROJAIYE, RICK SHAFER AND DENISE MAYBANK'S SECOND PRE-MOTION CONFERENCE REQUEST

Plaintiff John Doe has filed an amended complaint, seeking to transform this highly fact-bound dispute about his sexual misconduct into a class action. Defendants Michigan State University, the Michigan State University Board of Trustees (together, "MSU"), John Engler, Ande Dorojaiye, Rick Shafer and Denise Maybank (the "Individual Defendants") recognize that this Court previously denied them leave to move to dismiss. The Court believed that the case presented factual disputes that warranted some discovery, particularly on the qualified immunity issue. The Court also believed the Plaintiff's state-law claims were secondary to his federal due process and Title IX claims. For all of the reasons expressed in the first pre-motion conference request, which is incorporated herein, the Amended Complaint should be dismissed. In light of Plaintiff's Amended Complaint, MSU and the Individual Defendants maintain that it is now particularly important to allow them the opportunity to file a motion to dismiss, with full briefing on the issues, "before allowing a potentially massive factual controversy to proceed." *Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955, 1966 (2007).

Plaintiff's proposed class encompasses all MSU students (unlimited as to time) who were sanctioned (in any way) under the Relationship Violence and Sexual Misconduct Policy "without first being afforded a live hearing and opportunity for cross examination of witnesses." Am. Compl. ¶ 206. On behalf of the class, he seeks to pursue due process claims under both the federal and state constitutions. Plaintiff bases his federal due process claim on the Sixth Circuit's decision in *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), where the Sixth Circuit held that, when a disciplinary case turns on the parties' credibility, a public university must provide a respondent with a live hearing and the opportunity to cross-examine witnesses before subjecting the student to expulsion or suspension. He seeks injunctive and declaratory relief on

behalf of the class, Am. Compl. ¶ 225, as well as "a judgment against the individual defendants awarding Plaintiff and the Class damages in an amount to be determined at trial," *id*. ¶ (i).

In addition to the reasons previously set forth explaining why the Defendants should be permitted to move to dismiss, the Amended Complaint highlights three reasons why it is now particularly appropriate to give the Defendants their right to file motions to dismiss, as provided by the Federal Rules of Civil Procedure:

First, Plaintiffs seek to represent a class for claims under the Michigan State Constitution. As previously explained, MSU is entitled to Eleventh Amendment immunity from such a claim and there is no such claim against individual defendants. *Pung v. Mich. Dep't of Corr.*, 2015 U.S. Dist. LEXIS 40039 (W.D. Mich. Mar. 30, 2015) (Neff, J.). It would be also be particularly inappropriate to seek to create a new rule of Michigan Constitutional law in a federal court proceeding, warranting abstention. While the Court previously believed the state law issues were secondary, Plaintiff's Amended Complaint brings them to the forefront.

Second, a case decided by Judge Quist, after the pre-Motion conference held in this case, makes clear that defendants are entitled to qualified immunity. *Doe v. N. Mich. Univ.*, No. 2:18-CV-196, 2019 U.S. Dist. LEXIS 88717, at *17 (W.D. Mich. May 28, 2019). Judge Quist found that, prior to *Baum*, the Sixth Circuit had held that "universities must at least provide notice of the charges, an explanation of the evidence against the student, and an opportunity to present his side of the story before an unbiased decision maker." *Doe v. N. Mich. Univ.*, 2019 U.S. Dist. LEXIS 88717, at *20 (quoting *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017)). At that time, "it was not entirely clear that a student was entitled to a live hearing." *Id*. Similarly, "it was only after the disciplinary proceedings of this case that the Sixth Circuit stated in *Baum*, 903 F.3d at 578, that cross-examination is required if the fact-finder must 'choose

between competing narratives.'" *Id*. Thus, Judge Quist found that qualified immunity required dismissal of the claims against the individual defendants. This Court should do the same. And that issue is now of utmost importance, since Plaintiff seeks to represent a class that seeks both injunctive relief and damages that will place on the individual defendants precisely the burdens immunity was meant to avoid. The issue is of such importance that the individual defendants are entitled not only to a decision from this Court, but an immediate appeal to the Sixth Circuit on the issue. *MSI Regency, Ltd v. Jackson*, 433 F. App'x 420, 426 (6th Cir. 2011) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)).

Third, the Court should permit MSU and the Individual Defendants to move to dismiss or strike the class allegations. Plaintiff seeks to certify a class under Rule 23(b)(2), which permits a court to certify a class if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). There are many reasons the class fails as a matter of law. Among other things, under *Baum*, a live hearing and cross-examination is required only if the dispute rises or falls on a credibility dispute between the complainant and respondent. Thus, the proposed class's claims would require delving into the specific facts of every class member's individual disciplinary action, in order to determine whether credibility was an issue. The individualized nature of every case is evidenced by the two separate complaints before this Court that each exceed 70 pages. There are numerous other fundamental flaws in the class allegations, including that no claim can be "typical" since the "individual defendants" who can be sued depends on who worked on any given case. Those issues cannot be set forth in the three pages allotted here. The Court should allow full briefing on the issue before allowing Plaintiffs to transform this case into a procedural and factual mess.

Respectfully submitted,

Dated: July 19, 2019

s/ Michael E. Baughman

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CERTIFICATE OF SERVICE

I certify that on July 19, 2019, pursuant to Local Rule 5.7, I filed the foregoing Defendants' Pre-Motion Conference Request through the Court's Electronic Case Filing (ECF) system.

s/ Michael E. Baughman

Michael E. Baughman, Esq.